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IN THE
Supreme Court of the United States
OCTOBER TERM, 1946.

No. 289

DAN S. MARTIN, JR., PETITIONER,
VS.

ESTHER R. WAGNER, AS EXECUTRIX OF THE
ESTATE OF ZOE R. MARTIN, DECEASED,
JOHN D. MARTIN AND DAN S. MARTIN, SR.,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

MOTION OF THE RESPONDENT ESTHER R.
WAGNER, AS EXECUTRIX OF THE ESTATE
OF ZOE R. MARTIN, DECEASED, AND INDIVI-
DUALY, FOR A WRIT OF CERTIORARI TO
CORRECT A DIMINUTION OF THE RECORD.

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CORRECT A DIMINUTION OF THE RECORD.

The Respondent, Esther R. Wagner, as Executrix
of the Estate of Zoe R. Martin, deceased, and individual-
ly, respectfully files and presents this motion for a writ
of certiorari to correct a diminution of the record in this

cause, and in support thereof shows unto this Honorable Court the following:

The Supreme Court of the State of Alabama in its opinion rendered March 7, 1946, by which it affirmed the order and decree of the Probate Court of Jefferson County, Alabama, disallowing and dismissing the Petition of Dan S. Martin, Jr. to probate an alleged lost will of the decedent, William C. Martin, stated in part as follows:

"Our attention has been directed to the record in this court in the matter of the estate of William C. Martin, deceased, petition of Dan S. Martin v. Zoe R. Martin to probate the lost will. See *Catts v. Phillips*, 217 Ala. 488, 117 So. 34. Taking that record and the record in this case together, we have the following situation. William C. Martin died July 18, 1940, but the petition in the case at bar was not filed until January 15, 1945, after the death of the widow Zoe Rhode Martin, for whose estate Esther Wagner has been appointed executrix. Prior to the death of Zoe Rhode Martin, Dan S. Martin filed a petition to probate the lost will of William C. Martin, deceased, and took an appeal from the final judgment or decree of the Probate Court of Jefferson County, denying, disallowing and dismissing the petition. The appeal was dismissed by agreement April 12, 1943. The same attorney represented both Dan S. Martin and Dan S. Martin, Jr., in their respective petitions." (R. 23).

The case of *Catts vs. Phillips*, supra, cited therein is one which deals with the principle of the taking of judicial notice of the record of another case in the same Court in appropriate cases, and in citing it the Supreme Court of Alabama, in the opinion of this respondent, un-

doubtedly meant to be understood as taking judicial notice of the Petition of Dan S. Martin to probate an alleged lost will of the same decedent, William C. Martin, the proceeding referred to in the above excerpt from the State Supreme Court opinion.

The record of the Supreme Court of Alabama pertaining to the said proceeding brought by Dan S. Martin in the Probate Court of Jefferson County, Alabama, and appealed by him to the Supreme Court of Alabama after an order and decree of the said Probate Court denying, disallowing and dismissing his petition to Probate the Alleged Lost Will, consists principally of the record of the organization of the said Probate Court; Petition to probate the lost will; order on filing a petition to probate the lost will; citation to Zoe Rhode Martin; interrogatories filed by Zoe R. Martin; order of continuance; motion to strike interrogatories; order on filing of motion to strike, order of continuance on said motion to strike; demurrer of Zoe R. Martin, as Administratrix of the estate of William C. Martin, deceased, and Zoe R. Martin, individually, an heir and distributee of said decedent, to the petition to probate the lost will; order of the Probate Court sustaining the said demurrer; an amendment to the Petition to probate the lost will; the final order and decree of the said Probate Court denying, disallowing and dismissing the Petition to probate the lost will; security for costs of appeal to the Supreme Court of Alabama; waiver of notice; order on filing appeal bond to the Supreme Court of Alabama; and final order and judgment of the Supreme Court of Alabama dismissing the appeal upon agreement of parties.

The said Petition of Dan S. Martin to probate the alleged lost will, filed August 6, 1942, is in words and figures as follows:

"THE STATE OF ALABAMA
JEFFERSON COUNTY

IN THE PROBATE COURT OF SAID COUNTY

NUMBER.....

IN RE: ESTATE OF WILLIAM C. MARTIN, DE-
CEASED.

TO THE HONORABLE HENRY R. HOWZE AS
JUDGE OF PROBATE OF SAID COUNTY:

The petition of the undersigned Dan S. Martin respectfully represents unto your Honor that the said William C. Martin, who was an inhabitant of said County at the time of his death departed this life in said County on the 18th day of July 1940 leaving a last will and testament duly signed and published by him, executed and attested in the manner required by law in which will your petitioner, as he verily believes, is named as a legatee or devisee. Your petitioner further avers that the said decedent, so far as petitioner knows and believes, left surviving him the following heirs and distributees, namely: Zoe R. Martin, over the age of 21 years and a resident of Birmingham, Alabama, the widow; John D. Martin over the age of 21 years, a brother in Eufaula Barbour County, Alabama; Dan S. Martin over the age of 21 years, a brother who resides in Birmingham, Alabama.

Petitioner further represents and shows unto your Honor that the said will of the decedent duly executed by him contained substantially the following provisions, namely:

- (1) That all of testator's debts be paid.
- (2) That twenty-five per cent of his estate was willed, devised and bequeathed to your petitioner, Dan S. Martin.
- (3) That the remaining seventy-five per cent of his said estate was willed, devised and bequeathed to his widow, Zoe R. Martin for her lifetime; and that after her death the same was to be divided among the heirs at law of the said testator, William C. Martin.

"Petitioner further represents and shows unto your Honor that the said will has been lost or misplaced and that petitioner is unable to produce the original of said will; but there is set out hereinabove substantially the contents of said will as duly executed by the said William C. Martin.

Wherefore, Premises Considered, your petitioner prays that a day be set by your Honor for the hearing of this petition to probate said lost will; that due notice thereof as required by law be given to the widow and next of kin of said deceased; that upon the hearing of said petition on said day and upon proper proof as herein averred of the contents of said will and that the said will was duly executed; and that the same has been lost and cannot now be produced; and that substantially the contents of said will as finally executed be established by proper proof, the Court will admit the lost will to probate; and that such other proceedings, orders and decrees

may be had and made in the premises as may be requisite and proper to effectuate the due probate and recording of said lost will according to law.

(Signed) *Dan S. Martin*

Sworn to and subscribed before me this the 6th day of August, 1942."

"Branch Frazier
Notary Public"

The demurrer of Zoe R. Martin, as Administratrix and Zoe R. Martin, individually, to the said Petition to Probate is in words and figures as follows:

"STATE OF ALABAMA,
JEFFERSON COUNTY.

IN RE: ESTATE OF WILLIAM C. MARTIN,
deceased.

IN RE: PETITION TO PROBATE ALLEGED
LAST WILL OF WILLIAM C. MARTIN

IN THE PROBATE COURT

Comes Zoe R. Martin, as administratrix of the estate of William C. Martin, deceased, and Zoe R. Martin, individually, an heir and distributee of said decedent, and demur to the petition heretofore filed in said cause by Dan S. Martin, whereby the said Dan S. Martin seeks under the terms of said petition to offer for Probate an alleged lost will of William C. Martin, and as grounds

for said demurrer set down and assign the following, separately and severally, to-wit:

1. For that it does not sufficiently appear that William C. Martin left a will at the time of his death.

2. For that said petition is vague, indefinite and uncertain.

3. For that said petition is legally insufficient.

4. For that no facts are therein set forth that William C. Martin died leaving a last will sufficient under the laws of the State of Alabama.

5. For that no sufficient facts are shown which constitute a legal execution of said alleged will.

6. For that it does not sufficiently appear that said alleged will was legally witnessed.

7. For that the names of the subscribing witnesses to said alleged will are not set forth in said petition.

8. For that said petition is legally insufficient in that the names of the subscribing witnesses to said alleged will are not therein set forth.

9. For that it does not sufficiently appear that the names of the subscribing witnesses were legally and sufficiently affixed upon said alleged will.

10. For aught that appears said ~~alleged~~ will was destroyed by the testator prior to his death.

11. For aught that appears said alleged will was revoked by the testator prior to his death.

12. For that said petition is insufficient to show that William C. Martin died leaving a legally sufficient and binding will; and said petition fails to disclose and identi-

fy the names and identities of any subscribing witnesses to said alleged will.

13. The averment of said petition that the last will and testament was executed and attested in the manner required by law is a mere conclusion of the pleader and not supported by sufficient allegations of fact contained therein.

LANGE, SIMPSON, BRANTLEY & ROBINSON
SMYER & SMYER

Attorneys for Zoe R. Martin, as admr'x and in her individual capacity."

The amendment to the said Petition to Probate is as follows:

"THE STATE OF ALABAMA
JEFFERSON COUNTY

IN THE PROBATE COURT OF SAID COUNTY

IN RE: ESTATE OF WILLIAM C. MARTIN,
DECEASED.

TO THE HONORABLE HENRY R. HOWZE AS
JUDGE OF PROBATE OF SAID COUNTY:

Now comes your petitioner, Dan S. Martin, proponent in the matter of petition to probate a lost will of the said William C. Martin, deceased, and by leave of Court first had and obtained hereby amends his said petition heretofore filed in said cause as follows: namely:

1. By inserting immediately after the words "lost or misplaced" where said words first appear together in

said petition the following words "or destroyed by some agency or act other than that of the said William C. Martin, deceased, the testator."

2. By adding immediately before the prayer and just after the words, "executed by the said William C. Martin" where same last appear before the words "Wherefore premises considered" the following:

"Proponent further avers that the said will was duly executed in writing in his lifetime, by the said William C. Martin, deceased, and signed by him in the presence of two witnesses who subscribed their names to said will. And your petitioner further avers that the said will was in existence after the death of the said William C. Martin, deceased."

(signed) *Dan S. Martin*

Sworn to and subscribed before me
this 23 day of September 1942.

/s/ *Martha Bunyard*
Notary Public

The final order and decree of the said Probate Court, denying, disallowing and dismissing the said petition is as follows:

"WILLIAM C. MARTIN, DECEASED, ESTATE
OF, FINAL ORDER AND DECREE ON PE-
TITION OF DAN S. MARTIN TO PRO-
BATE AN ALLEGED LOST OR MISPLAC-
ED OR DESTROYED WILL OF SAID DE-
CEDENT.

Case No. 12837

PROBATE COURT.

September 24, 1942

This day having been regularly appointed for hearing the original petition of Dan S. Martin heretofore filed in this Court for the probate of an alleged lost or misplaced will and testament of said deceased, came the petitioner Dan S. Martin and filed an amendment to the said petition which amendment, among other things, alleged that said purported will was either lost or misplaced or destroyed by some agency or act other than that of the said deceased. Came also Zoe R. Martin in her capacity as administratrix of said estate and in her individual capacity and as an heir and distributee of the estate of said decedent, and refiled all grounds of demurrer heretofore filed and assigned to the said original petition, and assigned each and every such ground separately and severally to the said petition as amended. The said demurrer being argued, submitted and heard in open Court and being considered by the Court, it is,

ORDERED, ADJUDGED AND DECREED that the said demurrer be and is sustained on grounds 7, 8 and 9 thereof, and overruled as to the other grounds. Thereupon, the said petitioner being given the opportunity further to amend said petition if he should desire so to do, but having in open Court declined to plead further, it is therefore, ORDERED, ADJUDGED AND DECREED that the said petition of Dan S. Martin, as amended, be and the same is hereby denied. And it is also further ordered that the costs of this proceeding be taxed against the said petitioner, for which let execution issue.

DONE this the 24th day of September, 1942.

H. R. Howze, Probate Judge."

This final order was entered September 24, 1942.

On April 12, 1943, the Supreme Court of Alabama

entered an order dismissing the said appeal of Dan S. Martin pursuant to an agreement of the parties to said cause filed with said Supreme Court. This agreement stipulates merely that the appeal should be dismissed by agreement of parties.

The exact words and figures of the portions of the record of said cause in the Supreme Court of Alabama, other than the portions set out above in full, are omitted from this motion because, in the belief and opinion of the movant, either they are immaterial to any issue involved in this case, or setting them out verbatim is unnecessary to a decision on this motion.

Wherefore, said respondent moves that a proper order be made by this Honorable Court causing a writ of certiorari to be issued to the Supreme Court of Alabama to effect the transmittal to this Honorable Court of the entire record of the Supreme Court of Alabama of the said Petition and proceeding brought by said Dan S. Martin, or such portions of the said record as this Court may deem material to the issues involved, in order that the diminution of the record in this cause, herein shown, may be corrected.

And said respondent respectfully moves that such other or further order be entered as this Honorable Court may deem proper in the premises.

Respectfully submitted,
James A. Simpson,
Attorney for the Respondent.
Esther R. Wagner, as Executrix
of the Estate of Zoe R. Martin,
Deceased, and individually.

Smyer and Smyer,
Lange, Simpson, Robinson and Somerville,
Of Counsel.

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, Arnold Drennen, Notary Public in and for said state At-Large personally appeared Reid B. Barnes, who deposes and says that he is a member of the law firm of Lange, Simpson, Robinson & Somerville, Birmingham, Alabama, of counsel for the Respondent, Esther R. Wagner, as executrix of the estate of Zoe R. Martin, deceased, and individually, and is duly authorized to make this affidavit; that the facts alleged in the foregoing Motion for Certiorari to Correct a Diminution of the Record, including the contents of the portions of the Record in the Supreme Court of Alabama designated in said motion, are true and correct to the best of his knowledge, information and belief.

Reid B. Barnes,

Of Counsel for the Respondent.

Sworn to and subscribed
before me this 23rd day
of August, 1946.

Arnold Drennen
Notary Public